No. 96-667

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA, Petitioner,

v.

ROBERT E. HYDE, Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to 28 U.S.C. § 1915, this Court's Rule 39.4, and 18 U.S.C. § 3006A(d)(6), the respondent, Robert E. Hyde, moves for leave to proceed in forma pauperis. In support of his motion he states:

1. This proceeding is a petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit dated April 30, 1996, reversing his conviction in the United States District Court for the Northern District of California.

2. The Ninth Circuit found him eligible for appointment of counsel under the Criminal Justice Act and appointed undersigned counsel on April 10, 1995.

25 pp

WHEREFORE, petitioner prays that this court grant him leave to proceed in this Court in forma pauperis.

Respectfully submitted,

THE RESPONDENT

Dated: December 23, 1996

By: JONATHAN D. SOGLIN
5337 College Avenue, #321
Oakland, CA 94618
(510) 654-3354

Attorney for Respondent

No. 96-667

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA, Petitioner,

v.

ROBERT E. HYDE, Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

JONATHAN D. SOGLIN
(Counsel of Record)
5337 College Avenue, #321
Oakland, CA 94618
(510) 654-3354

Attorney for Respondent

QUESTION PRESENTED

Does deferment of acceptance of a plea agreement necessarily carry with it deferment of acceptance of a guilty plea? If so, under the Federal Rules of Criminal Procedure, must a defendant show a "fair and just reason" for rescinding a tendered guilty plea, when the court has not yet accepted the plea agreement on which the guilty plea depends?

TABLE OF CONTENTS

---

* The parties to the proceedings in the court of appeals included the United States of America and respondent, Robert E. Hyde.

TABLE OF AUTHORITIES

No. 96-667

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA, Petitioner,

v.

ROBERT E. HYDE, Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

Respondent, Robert E. Hyde, respectfully opposes the United States' petition to this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on April 30, 1996, vacating his conviction entered in the Northern District of California.

OPINIONS BELOW

The published decision of the United States Court of Appeals for the Ninth Circuit was filed on April 30, 1996, and was initially reported at 82 F.3d 319. As amended and superseded on denial of rehearing the opinion is published at 92 F.3d 779. Petition for Writ of Certiorari ("Pet.") App. 1a-7a. The district court's unpublished order denying respondent's motion to withdraw was filed on July 19, 1994. Pet. App. 8a-18a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 30, 1996. The United States' petition for rehearing was denied on July 29, 1996. The petition for certiorari was timely filed on October 28, 1996, the first business day following the ninetieth day for filing.

RULES INVOLVED

Rules 11 and 32(e) of the Federal Rules of Criminal Procedure and Section 6B1.1(c), p.s., of the United States Sentencing Guidelines are involved in this case, and are reproduced as an appendix to the Petition for Certiorari. Pet. App. 19a-26a.

STATEMENT OF THE CASE

The respondent's direct appeal followed a guilty plea on federal criminal charges alleging mail and wire fraud and arose out of his conviction and the 30-month guideline sentence imposed under the Sentencing Guidelines.

An eight-count indictment, filed in the Northern District of California on December 13, 1991, charged respondent with three counts of mail fraud, in violation of 18 U.S.C. § 1341 (Counts One, Four and Five); two counts of receipt of stolen property, in violation of 18 U.S.C. § 2315 (Counts Two and Three); and three counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts Six, Seven and Eight). CA9 ER 1-11.[1]

[1] Respondent's Excerpts of Record filed in the court of appeals are referred to as CA9 ER.

On November 29, 1993, the day set for jury trial, respondent entered a guilty plea to two counts of wire fraud (Counts One and Four) and two counts of receipt of stolen property (Counts Two and Three). Id. at 66-67. The district court, however, deferred acceptance of the plea agreement until after review of the Presentence Report. Id. at 67.

Pursuant to the plea agreement and in exchange for respondent's guilty pleas to Counts One through Four, the government agreed to move to dismiss Counts Five through Eight of the indictment and not to bring further charges against respondent in connection with his involvement with two loan brokerage firms. Id. at 21-23. In the plea agreement, the government also stipulated to sentencing calculations for respondent's base offense level, the grouping of offenses, role enhancement, and respondent's adjusted offense level. Id. at 24-25. The agreement also provided how restitution would be calculated. Id. at 25. Finally, the parties agreed the sentencing stipulations were not binding on the district court judge: "The district court will be free to make its own determinations pursuant to the Guidelines as to the appropriate sentence to be imposed." Id. at 26.

The agreement stated that it was made under Federal Rule of Criminal Procedures 11(e)(1)(B).[2] Id. at 21. As the agreement

---

[2] A plea agreement under Rule 11(e)(1)(A) requires the government to "move for dismissal of other charges." An agreement under Rule 11(e)(1)(B) requires the government to "make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court." An agreement under Rule 11(e)(1)(C) requires the government to

required that the government both dismiss charges and stipulate to sentencing calculations which were not binding on the district court, it was also a Rule 11(e)(1)(A) agreement.[3]

On December 23, 1993, less than a month after the change of plea hearing, respondent moved to withdraw his guilty plea on the grounds both that the agreement was made under duress and that the district court failed properly to advise him of the consequence of his plea, as required by Fed. R. Crim. P. 11(e)(2).[4] CA9 ER 70-72. The district court held an evidentiary hearing on June 2, 1994, and denied the motion to withdraw the guilty plea in a written order dated July 19, 1994, finding that respondent had failed to show that his guilty plea was coerced. Pet. App. 17a; CA9 ER 79, 85-95.

On February 28, 1995, the district court sentenced respondent to a 30-month term of imprisonment consisting of concurrent 30-

---

"agree that a specific sentence is the appropriate disposition of the case."

[3] In denying respondent's motion to withdraw his guilty plea, the district court agreed with the government that the statement in the plea agreement that it was a Rule 11(e)(1)(B) agreement was a typographical error and that it was really a Rule 11(e)(1)(A) agreement. Pet. App. 17a. On appeal, respondent argued that the agreement was a hybrid containing both Rule 11(e)(1)(A) and Rule 11(e)(1)(B) provisions; the government stuck with its argument that it was solely a Rule 11(e)(1)(A) agreement. Appellant's CA Br. 8-9; Gov't CA Br. 21-22. Although the court of appeals did not resolve this dispute, petitioner now agrees that the agreement "could be construed to fall within [Rule 11(e)(1)(B)]." Pet. 14 n.3.

[4] Although the motion was not filed in the district court until January 10, 1994, respondent signed it in prison on December 23, 1993, and the district court treated it as filed on that earlier date. CA9 ER 70-72; Pet. App. 10a.

months terms on each of Counts One through Four.[5] On March 7, 1995, the district court entered judgment. CA9 ER at 120-21, 127. Respondent timely appealed. Id. at 140.

On April 30, 1996, the Ninth Circuit reversed respondent's conviction, concluding that the district court erred by denying respondent's motion to withdraw his guilty plea.[6] The court explained, "[i]f the [district] court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement." Pet. App. 4a; 92 F.3d at 781. In so ruling, the court rejected the United States' argument that Rule 32(e) requires a defendant to show a "fair and just reason" for withdrawal from a guilty plea, even before acceptance of the plea agreement. The court explained that the district court's acceptance of the guilty plea did not trigger the requirements of Rule 32(e) because:

> "[t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated it accepted [the] plea."

---

5 The district court also ordered that the imprisonment be followed by three years of supervised release, and that Mr. Hyde pay a $5,000 fine and restitution in the amount of $477,990.00. CA9 ER 127-132. Mr. Hyde has served the entire 30-month term of imprisonment and was on supervised release when the court of appeals vacated his conviction.

6 The court of appeals did not discuss respondent's other challenges to his conviction and sentence.

Pet. App. 3a; 92 F.3d at 780 (quoting United States v. Cordova-Perez, 65 F.3d 1552, 1556 (9th Cir. 1995), cert. denied, --- U.S. ---, 117 S. Ct. 113 (Oct. 7, 1996) (No. 95-9101)). Noting the government's concern that United States Sentencing Commission policy statement in U.S.S.G. § 6B1.1(c) requires the district court to defer acceptance of certain types of plea agreements pending preparation of the presentence report, and citing Rule 11(e)(2), which makes such deferment discretionary, the court of appeals suggested, "if the Sentencing Commission's interference with district court discretion causes practical difficulties regarding pleas, as well it may, that is a situation to which the Commission can turn its attention." Pet. App. 3a-4a; 92 F.3d at 781.

Judge Ferguson concurred, restating his dissent in Cordova-Perez:

> I continue to believe [Cordova-Perez] was decided incorrectly and that an injustice was done. Yet the government insisted upon the result. Now it would like us to disregard Cordova-Perez, which of course would be a monumental disaster. The government cannot have it both ways. When it advocated the result in Cordova-Perez, it must live with the mistake.

Pet. App. 5a; 92 F.3d at 781.

On July 29, 1996, the court of appeals unanimously denied the United States' petition for rehearing and suggestion for rehearing en banc. Pet. App. 6a-7a.

STATEMENT OF LOWER COURT JURISDICTION UNDER RULE 14.1(i)

The district court had jurisdiction in this matter pursuant to 18 U.S.C. § 3231, in that the indictment alleged the commission

of federal criminal offenses. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, invoked by a timely notice of appeal pursuant to Fed. R. App. P. 4(b).

REASONS FOR DENYING THE WRIT

1. **Any Conflict Created by the Court of Appeals' Decision Would Be Better Left for Resolution by the Rules Committee or the United States Sentencing Commission.**

Petitioner argues that review by this court is necessary because "[t]he rule adopted by the court of appeals has damaging implications for the federal criminal system." Pet. 12. This concern, to the extent it is substantiated, is best resolved by amendment either to the rules of procedure or to the sentencing guidelines.[7]

Petitioner's worry is that the interplay between the federal rules, the sentencing guidelines, and the court of appeals decision in this case will "encourage[] defendants to engage in manipulation and gamesmanship." Pet. 15. Under United States Sentencing Guideline § 6B1.1(c), p.s., deferral of acceptance of the plea agreement pending preparation of the presentence report is mandatory where the defendant has pleaded guilty pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C).[8] The court of appeals' decision in this case would, as the government forebodes, allow defendants

---

7 As discussed under Part 2, *infra*, petitioner's assertions about the vast numbers of cases affected by the court of appeals holding are not substantiated.

8 As the court of appeals noted, the extent to which a Sentencing Commission policy statement which does not interpret a guideline may be binding is not definitively resolved. Cf. Stinson v. United States, 508 U.S. 36 (1993).

in some cases to withdraw a guilty plea at will after review of the presentence report, perhaps months after the Rule 11 hearing. Pet. 13, 15. The government assumes, without explaining why, that it would be undesirable for defendants to plead guilty only when they understand all of the likely consequences. To the contrary, a large number of appeals and post-conviction petitions would be eliminated by allowing access to full pre-sentence information in these cases. On the other hand, in some cases, the modest amount of judicial time involved in the Rule 11 proceeding would be wasted when a certain number of defendants later realize that they stand to gain very little by waiving their constitutional right to stand trial. Be that as it may, this practical concern would be better addressed by amendment to the guidelines, changes in procedures, and amendment to the rules, rather than review by the Court, if any change in the rules is thought desirable.

As suggested by the court of appeals in this case (Pet. App. 4a), the Sentencing Commission could amend § 6B1.1(c), p.s., so that deferment of acceptance of Rule 11(e)(1)(A) and 11(e)(1)(C) agreements is not described as mandatory. This is already the case with Rule 11(e)(1)(B) agreements, which the district court can accept at the Rule 11 hearing. U.S.S.G. § 6B1.1(c). Earlier acceptance of the agreements would bind the parties earlier and eliminate the late withdrawals petitioner fears. An amendment to section 6B1.1(c) could also eliminate the conflict with Rule 11(e)(2) which makes the deferment of acceptance of type (A) and (C) agreements permissive.

If earlier acceptance of the agreement raises concerns that acceptance might come before review of the presentence report, then another solution might be earlier preparation of presentence reports. The rules permit preparation and review of the presentence report prior to acceptance of the guilty plea and plea agreement. Fed. R. Crim. P. 32(b)(1), (3), and (6); United States v. Kurkculer, 918 F.2d 295, 301 (1st Cir. 1990) (Rule 32 was modified to permit the district court, with the defendant's permission, to see the presentence report prior to accepting a guilty plea).

Pre-plea preparation of presentence reports would not only permit earlier acceptance of plea agreements, but would better ensure that the defendant enters the guilty plea with full knowledge. See United States v. Puckett, 61 F.3d 1092, 1099 (4th Cir. 1995) (court "sympathetic" to defense counsel's concerns that presentence report should be prepared during plea negotiations and prior to acceptance of the guilty plea). Such procedures would also ensure that guilty pleas more accurately reflect the seriousness of the offense.

Even without a pre-plea presentence report, prosecuting attorneys can avoid late withdrawals of guilty pleas by complying with another suggestion of the Sentencing Commission: "prior to entry of a plea of guilty ... to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines." U.S.S.G. § 6B1.2, comment. Such early disclosure would eliminate

most surprises in the presentence report and thus significantly reduce the impetus for a defendant to withdraw a guilty plea late in the proceeding.

Amendment of the Federal Rules of Criminal Procedure could also resolve any conflict raised by the court of appeals' decision. Petitioner argues that the court of appeals' decision is inconsistent with Rules 11(e)(4) and 32(e), which address a defendant's withdrawal from a guilty plea.

Rule 11(e)(4) provides that, "[i]f the court rejects the plea agreement, the court shall ... afford the defendant the opportunity to then withdraw the plea." Rule 32(e) provides that, "[i]f a motion to withdraw a plea of guilty ... is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Petitioner argues that the court of appeals' holding in this case renders Rule 11(e)(4) "superfluous" and is in conflict with Rule 32(e). Pet. at 9-10. If the holding is inconsistent with the rules, which respondent does not concede, an amendment to the rules could eliminate the conflict.[9] Rule 32(e) could be amended to clarify its scope. If the intent was that the "fair and just reason" requirement apply before acceptance of the plea agreement, the rule could be amended to say so explicitly. Likewise, if the intent was as interpreted by the court of appeals in this case, Rule 32(e) could be amended to state expressly that prior to

---

9 As explained under Point 3, *infra*, the court of appeals' decision is not inconsistent with the rules.

acceptance of a plea agreement, the defendant is free to withdraw the plea at will.

This Court has noted that it is Congress' intent that conflicts concerning the United States Sentencing Guidelines be resolved, not by this Court, but by the United Sentencing Commission. Braxton v. United States, 500 U.S. 344, 347-48 (1991). In charging the Commission with the duty of reviewing and revising its Guidelines, "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348. Because the Commission has the duty to review and revise the Guidelines and because the Commission has the power to decide whether amendments to the Guidelines should be given retroactive effect, this Court has recognized that it must be "more restrained and circumspect in using [its] certiorari power as the primary means of resolving such conflicts." Ibid.

The Court has taken a similar position with respect to interpretive questions created by the Federal Rules of Criminal Procedure, holding that such inconsistencies should be left to "resolution by the rule-making process." Lott v. United States, 367 U.S. 421, 425-26 & n.9 (1961).

Such restraint is appropriate in this case where the issue is rule-based and can be resolved best through the rule-making and guideline-amending processes. For this reason, the writ should be denied.

2. Although There Is An Inter-Circuit Split, Review By This Court Is Premature.

As noted by petitioner (Pet. 11), the decision of the court of appeals is in conflict with decisions of the Fourth and Seventh Circuits. United States v. Ewing, 957 F.2d 115 (4th Cir.), cert. denied, 505 U.S. 1210 (1992); United States v. Ellison, 798 F.2d 1102 (7th Cir. 1986), cert. denied, 479 U.S. 1038 (1987). The conflict is neither deep nor engrained, however. Furthermore, there is no evidence that many cases are affected by the court of appeals' decision. Review is, in any event, premature.

In urging a grant of certiorari, petitioner suggests that a great many cases will be affected by the court of appeals' decision. Petitioner's floodgates argument is unsupported by the record or by other sources. Petitioner cites the statistic that 95% of all criminal cases are disposed of by guilty pleas. Pet. at 1, n.2. Without citation to any authority, the petitioner also claims that "[i]n most circumstances" and "ordinarily" the district court defers acceptance of the plea agreement pending preparation of the presentence report. Pet. at 7, 15. Petitioner's lack of authority for this assertion is important. Petitioner argues that review by this Court is warranted because "the [court of appeals'] decision threatens to introduce substantial instability into the plea bargaining process that is pivotal to the resolution of the majority of federal criminal cases." Pet. at 7 (emphasis added). While the majority of cases are resolved no doubt by guilty pleas, there is no evidence of how often the district court defers acceptance of a plea agreement.

And, of the cases where the district court defers acceptance of the plea agreement, there is no evidence of how often defendants do or would seek to withdraw from guilty pleas. The paucity of cases addressing this issue is perhaps the best evidence that this is not a frequent occurrence. The government cites two in a ten-year period, hardly a strong indication of crisis. As the impact of the court of appeals' decision is not as vast or dire as portrayed by petitioner, review is not warranted.

Petitioner warns that the holding of the court of appeals "encourages defendants to engage in manipulation and gamesmanship." As examples, petitioner suggests that a defendant could delay a trial several months by withdrawing his plea just before sentencing or the defendant could "delay his decision whether to plea guilty until he has had the opportunity to review the presentence report." Pet. 15. These concerns are not present in this case. Respondent moved to withdraw his guilty plea less than one month after his guilty plea, and long before the presentence report was prepared and disclosed to the parties. Pet. App. 9a-10a; Presentence Report, at 1. If these are petitioner's concerns, review of this issue should await a case which presents those facts.

As noted by petitioner (Pet. 11), only three of the federal circuits have ruled on this issue in published decisions, and those three circuits have each only published one decision on the issue. Review would be better left for a case decided after the issue has been considered and discussed by more of the lower courts. In fact, the scope of the court of appeals' decision may

be fine-tuned in the near future. A recent district court decision held that the Ninth Circuit's decision in this case applies only to Rule 11(e)(1)(A) and 11(e)(1)(C) agreements, and not to Rule 11(e)(1)(B) agreements. United States v. Lopez-Reyes, 933 F.Supp. 957, 959-60 (S.D. Cal. 1996). Should the Lopez-Reyes defendant or another similarly situated defendant appeal, the court of appeals' may narrow the scope of its earlier decision.[10]

At a later date, the impact of the court of appeals' decision will be more apparent, the nuances of the legal argument will be more finely tuned, and the Sentencing Commission and Advisory Committee on Rules will have had an opportunity to amend the guidelines and rules to clear up ambiguity and eliminate conflict. For these reasons, review by this Court is premature at this time.

3. The Court Of Appeals Ruling Is Not Inconsistent With The Rules Of Procedure.

Petitioner argues that the court of appeals' holding in this case is in conflict with Rule 32(e) and renders Rule 11(e)(4) "superfluous." Pet. at 9-10.

---

10 An appeal by the Lopez-Reyes defendant appears likely. Following denial of his motion to withdraw his plea, but before he was sentenced, the defendant filed in the Ninth Circuit a "Petition for Permission to Appeal" under 28 U.S.C. § 1292(b). In an unpublished order, the Ninth Circuit construed the petition as a notice of appeal and dismissed the appeal for lack of jurisdiction. United States v. Lopez-Reyes, No. 96-80288 (9th Cir. Sept. 13, 1996). Given his desire to withdraw from the plea agreement and given his first attempt to appeal, Lopez-Reyes, who is still awaiting sentencing (United States v. Lopez-Reyez, No. CR-95-478 (S.D. Cal.)), is apt to pursue an appeal of the district court's denial of his motion to withdraw after judgment is entered.

There is no conflict with Rule 32(e), because the court of appeals' decision is premised on the fact that deferment of acceptance of the plea agreement necessarily carries with it deferment of acceptance of the guilty plea. Pet. App. 3a. In effect, there was no final acceptance of the guilty plea, even though the district court stated that it "accepted" the plea. Ibid. The guilty plea was inherently conditional, not having effect until the district court accepted the agreement. This is the position taken by the court of appeals in Cordova-Perez, holding that after a guilty plea the district court can reject the plea agreement, vacate the guilty plea, and order that the defendant be tried. Cordova-Perez, 65 F.3d at 1556. As emphasized in Judge Ferguson's concurrence in this case, the government did not disagree with this proposition when it was to its advantage in Cordova-Perez. Pet. App. 5a.

Petitioner suggests that Cordova-Perez is not controlling because in that case the district court rejected the plea agreement. Pet. 10 n.1. But the significance of Cordova-Perez is not what it said about a defendant's right to withdraw (in fact there is no indication that the defendant in that case wanted to withdraw), but what it says about the effect of deferment of acceptance of the agreement. Petitioner does not address this aspect of the Cordova-Perez decision, although it is the aspect which is critical to its role as precedent for the instant case.

In Cordova-Perez, the district court, as in this case, accepted the guilty plea but not the plea agreement. Cordova-Perez, 65 F.3d at 1554. After reviewing the presentence report,

however, the district court in Cordova-Perez rejected the plea agreement, vacated the defendant's guilty plea to a lesser offense, and reinstated the original indictment. Ibid. On appeal, the defendant argued that the district court violated the Federal Rules of Criminal Procedure and the Double Jeopardy Clause. Id. at 1554-57. The Ninth Circuit rejected these arguments because acceptance of the guilty plea was conditional: "deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea." Cordova-Perez, 65 F.3d at 1556. The Cordova-Perez court thus went on to hold that the possibility that the court might vacate the guilty plea is inherent when acceptance of the guilty plea is conditional. The court also held that jeopardy does not attach when acceptance of the guilty plea is conditional. Cordova-Perez, 65 F.3d at 1556-57.

When the defendant in Cordova-Perez sought review by this Court, petitioner opposed a grant of certiorari, and agreed with the court of appeals' holding that "acceptance of the guilty plea is inherently conditional upon the later acceptance of the plea agreement." Brief for the United States in Opposition, at 6 n.4, Cordova-Perez (No. 95-9101). Although the conditional nature of the acceptance of the guilty plea was necessary to the court of appeals' holding in Cordova-Perez, petitioner did not think this Court's review was needed to resolve the question of whether deferment of acceptance of the plea agreement necessarily carries with it deferment of acceptance of the guilty plea. In this case,

where that holding it to its disadvantage, petitioner now thinks otherwise.

If the guilty plea is conditional and has not been finally accepted, then the requirements of Rule 32(e) do not apply. That such a guilty plea can be withdrawn for any reason that the defendant deems sufficient neither renders the Rule 11 proceeding a mere formality nor undermines the solemnity of the proceeding, as petitioner fears. Pet. 8-9. Even if a defendant can withdraw a guilty plea at will, the Rule 11 colloquy remains a significant event--the district court must still comply with all the requirements of Rule 11, personally advising the defendant of the nature of the charges, the possible penalties, and the constitutional rights waived by the guilty plea. That the defendant is not bound by the agreement until later does not make the taking of the plea any less important. If anything undermines the solemnity of the Rule 11 proceeding, it is the deferment of the acceptance of the plea agreement, or the entry of a plea prior to review of the presentence report.

The holding that a defendant can withdraw for any reason before acceptance of the plea agreement does not render Rule 11(e)(4) superfluous. Rule 11(e)(4) provides, in pertinent part, "[i]f the court rejects the plea agreement, the court shall ... afford the defendant the opportunity to then withdraw the plea." Citing this language, petitioner claims that Rule 11(e)(4), "provides that the defendant has an absolute option to withdraw his guilty plea under one circumstance-where the court rejects the

plea agreement." Pet. 9 (emphasis added). Petitioner ignores the context of the language it cites.

Rule 11(e)(4) is not a rule setting out when a defendant can withdraw a plea of guilty. Rule 11(e)(4), which is entitled "Rejection of a Plea Agreement," simply sets out what the district court must do upon rejecting a plea agreement: inform the parties of the rejection of the agreement; advise the defendant that the court is not bound by the agreement; afford the defendant the opportunity to withdraw; and advise the defendant that if he or she persists in the guilty plea, that the disposition may be less favorable than contemplated by the agreement. Pet. App. 22a. The rule does not purport to set out all of the circumstances under which a defendant can withdraw a guilty plea. It would not make sense to place under the heading "Rejection of a Plea Agreement" a provision for withdrawing from a guilty plea when the district court has not yet rejected the agreement. Since Rule 11(e)(4) does not set out all of the circumstances under which a defendant can withdraw from a plea agreement, the court of appeals decision allowing withdrawal in a circumstance not covered by Rule 11(e)(4) is not in conflict with that rule.

Because the court of appeals' decision is not in conflict with the federal rules of procedures, review by this Court is not warranted.

////

////

////

////

CONCLUSION

For the foregoing reasons, respondent Robert E. Hyde requests that this Court deny the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit reversing his conviction.

Dated: December 23, 1996

Respectfully submitted,

Jonathan D. Soglin
Attorney for Respondent